

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Retention by Broadcasters of Program Recordings	)	MM Docket No. 04-232
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**COMMENTS OF MINORITY BROADCASTERS, INC.**

Minority Broadcasters, Inc. (“Minority”)<sup>1</sup> submits these comments in response to the Commission’s *Notice of Proposed Rulemaking*<sup>2</sup> seeking comment on its proposal to require broadcasters to retain recordings of their programming for a certain period of time in order to facilitate the Commission’s ability to investigate and prosecute complaints for enforcing restrictions on obscene, indecent and profane broadcast programming.

For the reasons set forth below, Minority believes this proposal should not be enacted because it is unwarranted given the recent history of complaints and the Commission’s ability to investigate and prosecute same; it is technically and financially burdensome, particularly to broadcasters that meet the “small business” definition; and because the First Amendment implications and “chilling effect” that such a rule would create on broadcast programming.

According to the FCC’s data, there are 13,476 AM, FM and FM Educational radio stations as of March 31, 2004, and 1,744 UHF and VHF television stations (not including low power, booster and translator stations)<sup>3</sup>. With all of these broadcast stations, the FCC received, between the years 2000 and 2002, a total of 14,379 indecency complaints covering a mere 598 programs. Clearly, there were multiple complaints over a small number of programs in order to have such percentages. Of those 14,379 complaints, the Commission denied or dismissed a grand total of 169 because of a lack of tape, transcript or significant excerpt.<sup>4</sup> Expressed mathematically, that means the whopping sum of 1.175% of all indecency complaints were dismissed for lack of a tape or transcript. Indeed, recent trade publication reports suggest that those persons who regularly complain to the FCC concerning programming are well organized and funded, are cognizant of the requirements of filing an actionable complaint, and are well versed in providing tapes, transcripts and/or excerpts necessary to substantiate the alleged infraction. Indeed, even where an exact excerpt cannot be provided, the Commission

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<sup>1</sup> Minority is the FCC licensee of AM station WOCN, Miami, Florida.

<sup>2</sup> *Notice of Proposed Rulemaking* FCC 04-145 released July 7, 2004 (“Notice”).

<sup>3</sup> <http://www.fcc.gov/mb/audio/totals/bt040331.html>

<sup>4</sup> Letter from Chairman Powell to Hon. John D. Dingell, March 2, 2004.

acknowledges that it is more than capable of adjudicating a complaint.<sup>5</sup> There does not appear to be any overriding or imminent threat to the Commission's ability to adjudicate indecency complaints for lack of adequate transcriptions or tapes that would warrant imposition of this extremely burdensome proposal. The current rules are capably met by complainants who are well versed in the requirements of a bona fide complaint and seem quite competent and capable in 98.825% of the time in providing the Commission with sufficient information to evaluate a complaint.

Although the radio industry is significantly consolidated, there are still many individual licensees who struggle on a daily basis to "make ends meet" in their business and attempt to control expenses and costs in order to remain profitable. Imposition of this proposed rule would add significant additional capital expense to such broadcasters. As noted by other commenters, there are only a few commercially viable alternatives currently available that would permit broadcasters to tape/record and store anywhere from 960 to 1140 hours of programming on a regular basis (60 or 90 days from 6 a.m. to 10 p.m.). All of these solutions cost, at a minimum, several thousand dollars, not including the manpower time and effort to install, train and maintain, the media necessary to store the programming, the physical space needed to maintain the equipment, the additional staff necessary to maintain the programming and regularly update and purge recordings in order to manage the size of stored material.

The Commission's "shotgun" approach to a perceived problem caused by a relatively small number of broadcasters unfairly burdens all those broadcasters who, as a whole, comply with the Commission's indecency rules and who are likely to never incur an indecency complaint as a result of their programming (For example, it would be difficult to imagine that a religious noncommercial station or a classical music formatted station would engender a complaint for indecency). Imposing such a significant financial burden on these stations could have the potential effect of causing them to seek new revenue sources in order to offset the additional expense. Such new revenue sources could include airing new "controversial" programming in order to attract more listeners and/or viewers, which in turn could result in more potential complaints for indecency. The irony of such a new rule (requiring broadcasters to retain programming to facilitate complaint resolution) resulting in an increase in potential complaints should not be lost on the Commission.

Finally, the imposition of such a rule could result in a chilling effect on broadcasters' willingness to fully exercise their First Amendment rights. In the current political climate, it is not a far stretch to envision the possibility of individuals and groups finding, for example, that certain political speech was "indecent" (Imagine if a broadcaster had aired the Vice President's recent comments to Senator Leahy on the Senate floor, which the Commission has already ruled in the context of Bono's comments on NBC to be "indecent"). Requiring a broadcaster to, in effect "build its own gallows" by retaining all aired programming will certainly have a chilling effect on the breadth and scope of programming.

For all of the foregoing reasons, it seems apparent to this commenter that the proposed rules are (1) unnecessary for effective enforcement of the Commission's indecency rules; (2)

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<sup>5</sup> See *Citicasters Co., Licensee of KSJO(FM), San Jose, California*, 15 FCC Rcd 19095 (EB 2000).

overly burdensome from both a legal and economic standpoint; and (3) would cause a chilling effect on the free exercise of ideas and public discourse.

If the Commission is intent on enacting such a rule, it should not be applied in a “shotgun” manner but rather crafted to meet the purported need. One suggestion is to exempt “small businesses” from the rule in order to minimize the burdensome economic effects of same. The Commission has a long history of exempting and/or streamlining processes and rules for small businesses in order to facilitate their continued viability in the broadcasting industry.<sup>6</sup>

In conclusion, Minority recommends rejection of the proposed rule and requests the Commission continue to utilize its existing and effective rules to investigate and prosecute complaints for indecency.

RESPECTFULLY SUBMITTED,

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<sup>6</sup> See e.g. 47 U.S.C. §257 and the current proceeding in MM Docket 04-228 seeking comment on ways to further Section 257 mandate to eliminate market entry barriers for small businesses.